

1990

State of Utah v. Raymond Phillip Cabututan : Brief of Appellant

Utah Supreme Court

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DOCUMENT

BRIEF

9
CKET NO.

900289
IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

)

Plaintiff/Appellee,

)

BRIEF OF
DEFENDANT/APPELLANT

vs.

)

RAYMOND PHILLIP CABUTUTAN,

)

CASE NO. 900289

Defendant/Appellant,

)

Argument Classification 2

BRIEF OF DEFENDANT/APPELLANT

Appeal from a final judgment of conviction rendered in the
First Judicial District Court, F. L. Gunnell, Judge.

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff/Appellee,) BRIEF OF
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STATEMENT OF JURISDICTION OF THE UTAH SUPREME COURT

Appellate jurisdiction to decide this appeal is granted to the Utah Supreme Court under authority of U.C.A. 78-2-2(3)(i) (ch. 1953, as amended). Defendant/Appellant was convicted by the State of Utah in the First Judicial District Court, Box Elder County with murder in the second degree, a felony of the first degree; aggravated assault, a felony of the third degree; and threatening or using a dangerous weapon in a fight or quarrel, a class B misdemeanor. The jury verdict of guilty was pronounced on January 26, 1990. Sentence was pronounced on February 21, 1990, and the Appellant filed a Motion for New Trial on March 2, 1990, together with an Affidavit (R352). A hearing on the Motion for New Trial was held March 23, 1990. Thereafter on May 4, 1990, Judge Gunnell denied the Motion for New Trial, and Appellant filed his Notice of Appeal on May 31, 1990, pursuant to Utah R. App. P. Rule 4(b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD
OF APPELLATE REVIEW FOR EACH ISSUE WITH SUPPORTING AUTHORITY

1. Was Appellant denied his United States Sixth and Fourteenth Amendment constitutional right and State of Utah constitutional guarantee of effective assistance of counsel, a fair trial, due process, and equal protection as a result of the following acts of the Trial Court:

a. initially refusing to appoint, and then belatedly

appointing a private investigator to assist Appellant's trial counsel in pretrial investigation and preparation?

b. denying a Motion for Continuance and direct denial of Appellant's Motion to Appoint Psychological and Expert Personnel and Motion to Allow Psychological Testing and Mental Evaluation for the purpose of establishing by expert testimony that the Appellant could not and did not form the intent to commit second degree murder due to voluntary intoxication?

c. denying Appellant's Motion for the Jury to View the Scene of the Crime?

d. requiring the jury to sit all day in the jury room while waiting for the jury instructions to be prepared?

The standard of review in regard to these issues are both constitutional law, see Ake vs. Oklahoma, 470 U.S. 68, 76-87, 105 S. Ct. 1087, 1092-98, and whether the Court abused its discretion. State vs. Roedl, 107 Utah 538, 155 P. 2d 74, (UT 1945).

2. Did the following acts of the Box Elder County Attorney constitute reversible error either through improper statements made individually or cumulatively, and did the Trial Court commit reversible error by denying Appellant's Motion for a Mistrial based upon the acts set forth in subparagraphs a. through d. below:

a. Allowing perjured testimony of Richard Anderson, an eye-witness, to be used at trial;

b. By discounting Defendant's claim of self-defense, by remarking that it was made up and rehearsed;

c. Failure to produce the so-called weapon (sharpening stone) used in the aggravated assault against Eddie Apodaca.

d. Vouching for the credibility of Richard Anderson, the State of Utah's key eyewitness.

The standard of review in regard to improper prosecutorial statements or actions is whether the prosecutor's remarks or actions brought to the attention of the jurors matters that they would not be justified in considering in reaching their verdict, and if so, whether there is a reasonable likelihood that the misconduct so prejudiced the jury that a favorable result for the Defendant would have occurred. State vs. Speer, 750 P.2d 186, 190 (UT 1988). Ruling on whether the conduct of the prosecution warranted a mistrial will not be overturned absent an abuse of discretion.

3. Did Appellant's trial counsel fail to provide Appellant with effective assistance of counsel as required by the United States Sixth and Fourteenth Amendments of the Constitution? In order to establish ineffective assistance of counsel, the Appellant must show; (1) that the Appellant's trial counsel rendered a deficient performance in some demonstrable manner, and (2) that a reasonable probability exists that except for ineffective assistance of counsel, the result would have been different. State vs. Geary, 707 P.2d 645, 646 (UT 1985). In other words, was the Appellant prejudiced by his counsels performance to such an extent that the trial cannot be relied upon as producing a just result?

4. Did the Court unfairly deny Appellant's Motion for a New Trial by failing to consider the testimony of 3 Co-Defendants, (who are eyewitnesses that testified in later separate trial, but refused to testify in Appellant's trial by exercising their Fifth

Amendment rights against self-incrimination) in light of their exonerating statements? The standard of review is whether the Trial Court abused its discretion. State vs. Harris, 513 P.2d 438 (UT 1973).

5. Was Appellant denied a fair trial because the Jury, Court and Criminal System was prejudiced towards him? Appellant has personally requested to counsel that these matters be presented to the Court, but has no supporting authority.

6. Was there cumulative error made in this case, sufficient to warrant a reversal of Appellant's conviction? Cumulative error exists if the cumulative impact of substantial errors prejudiced Appellant's right to a fair trial. See State vs. Rammel, 721 P.2d 498, 501-02 (UT 1986).

CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE INTERPRETATION
IS DETERMINATIVE

The interpretation of the following constitutional provisions, statutes and rules is determinative of the issues stated:

Point 1: Sixth Amendment of the U. S. Constitution
Fourteenth Amendment of the U. S. Constitution
Article I, Section 12
Constitution of Utah
U.C.A. 77-32-1(3)
U.C.A. 76-5-203(1)
U.C.A. 77-14-3

Point 2: Sixth Amendment of the U. S. Constitution

Point 3: Sixth Amendment of the U. S. Constitution
Fourteenth Amendment of the U. S. Constitution
U.C.A. 77-14-3

Point 4: Sixth Amendment of the U. S. Constitution
Fourteenth Amendment of the U. S. Constitution
U. C. A. 77-14-3

Point 5: Sixth Amendment of the U. S. Constitution
Fourteenth Amendment of the U. S. Constitution

Point 6: Sixth Amendment of the U. S. Constitution

STATEMENT OF THE CASE

The Criminal Information filed against Appellant in the First Circuit Court of Box Elder County, Utah, (R-4) charged Appellant and three Co-Defendants, Don Brown, William Cummins, and Billy Cayer, with committing the crime of murder in the second degree, a felony of the first degree, on the night of October 25, 1989, in violation of U.C.A. 76-5-203 (1953 As Amended). Additionally, Appellant alone was charged with two separate counts of aggravated assault, each a third degree felony in violation of U.C.A. 76-4-203 (1953 As Amended). (R-4) Allegedly all four defendants jointly and in concert caused the death of Miguel (Mike) Ramirez resulting from numerous blows from the defendant's feet, hands, and a wrench, wielded solely by Appellant, during a fight that occurred outside of the trailer houses where the Defendants were employed. All of the Defendants, as well as the State's three eyewitnesses to the alleged crime, Richard Anderson, Eric Tilley, and Eddie Apodaca, resided in a small trailer camp consisting of four trailers parked on a remote piece of land located on the Northwest shore of the Great Salt Lake. The trailers were owned by Western Brine Shrimp Company, which employed all of the Defendants and eyewitnesses.

The evidence was that the night of October 25, 1989 was dark, cloudy, and a moonless night; the only outside lighting for tens of

years to life, with all counts to run concurrently.

STATEMENT OF RELEVANT FACTS OF ISSUES PRESENTED FOR REVIEW

According to the testimony of Eddie Apodaca, one of the State's three eyewitnesses, that on the evening of October 25, 1989, the Appellant, along with eight other employees of Western Brine Shrimp Company, were present and residing in three trailer houses located on the company's property on the northwest side of the Great Salt Lake. [T19-20] Of the nine crew members, Richard Anderson and Eric Tilley, the State's other eyewitnesses, and Sherman Gallardo resided in Trailer #1.[T19,33] Eddie Apodaca, Appellant, and Miguel (Mike) Ramirez, the victim, resided in trailer #2, up until the night of the incident. [T19,20,33] Billy Cayer, Don Brown, and William Cummins resided in trailer #3. At approximately 9:45 p.m., William Cummins went to trailer #2 [T19-20;534] and asked Eddie Apodaca to come over to trailer #3. [T20] When Eddie Apodaca entered trailer #3, the residents of trailer #3 as well as Appellant were present [T20], who had taken some of his items to trailer #3, were drinking whiskey and vodka. [T31] In a friendly manner, Eddie Apodaca took a drink. [T32] Don Brown accused Eddie Apodaca of acting like he was the foreman of the crew. Appellant also expressed his displeasure with Eddie Apodaca for failing to help Appellant with some work. [T21] At this point in time, Eddie Apodaca's story begins to differ materially from the Appellant's testimony, which is set forth below. Eddie's story was that he was struck in the back of the

miles around the camp were the dim lights coming from the trailers themselves.

On that night of October 25, sometime between 9:00 p.m. and midnight, Appellant and Co-Defendants Cummins, Brown, and Cayer were sitting in a trailer consuming alcoholic beverages. Eddie Apodaca, a worker at the camp, came to the trailer and an argument started between Appellant and Apodaca, and thereafter, Appellant struck Apodaca. Apodaca got up and returned to his trailer and started to dress while explaining what had happened to his roommate, Mike Ramirez. Thereafter Brown, Cummins, Cayer and Appellant entered Apodaca and Ramirez's trailer. Subsequently, another fight ensued, knives were drawn, and Mike left the trailer. Cummins, Brown, and Appellant were all among the three or four people, other than the victim, that participated in the latter part of the fight that occurred outside the trailers, when the fight escalated and weapons were used. Eventually, the fight ended, but the next morning, near five o'clock, Ramirez died of multiple blunt trauma injury.

Appellant properly raised the following defenses: voluntary intoxication as precluding him from forming the requisite intent for a second degree murder; self-defense because the victim wielded a knife; and either non-participation in or withdrawal from the fight that occurred after Appellant had defended himself from Ramirez outside the trailers. After a separate jury trial lasting five days, the Appellant was found guilty of second degree murder, aggravated assault, and threatening or using a dangerous weapon in a fight or quarrel and sentenced to imprisonment for a term of five

head with a sharpening stone by Appellant. [T21] Then after a struggle, Eddie ran back to his trailer. [T22] Shortly thereafter, defendants Don Brown, William Cummins, Billy Cayer, and Appellant all entered trailer #2 at approximately the same time. [T22] Appellant was seen holding nunchunks. [T23] Mike Ramirez jumped between Eddie Apodaca and the four men. [T23] Cummins stated they should get a knife in Mike Ramirez's pocket. [T23] Then, both Mike Ramirez and Don Brown pulled out knives. [T24] After Mike Ramirez dropped his knife, he was pulled out of trailer #2. [T24] Billy Cayer remained with Eddie Apodaca in trailer #2. [T25]

Billy Cayer, who was drunk, tried to hit Eddie Apodaca several times. [T25] A few minutes later Don Brown came back into trailer #2 and told Billy Cayer to leave Eddie Apodaca alone, and to gather his things and leave camp. [T26]

As Eddie Apodaca exited trailer #2 and ran between trailers #1 and #2 [T26], he saw Mike Ramirez lying on the ground [T54] being kicked by a blur of people standing around him. William Cummins then asked Eddie Apodaca if he was going to help his buddy just prior to striking Eddie Apodaca and knocking him down behind the trailers. [T26]

As soon as Eddie Apodaca returned to his feet, Appellant came at him with a wrench in his hand. [T27] Eddie Apodaca took off running to the north [T26], ran into bags of brine shrimp eggs [T56,526], and then heard William Cummins say "leave him alone", "let him go", "let's finish this guy", or something like that. Eddie Apodaca did not know whether anyone was following him because it was pretty dark. After running about 60 feet, Eddie Apodaca

looked back between the trailers and saw a blur of more than one person standing around Mike Ramirez. [T56-57]

According to the testimony of Richard Anderson, another eyewitness, he was awakened by a commotion around 10:30 p.m. [T64] Eric Tilley's testimony was that he was the first person to get up in trailer #1 and roused Anderson out of bed. [T150] Richard Anderson stated, "let's not get involved", [T152] and consequently Richard Anderson, Eric Tilley, and their roommate Sherman Gallardo waited a couple of minutes before Sherman Gallardo opened the door to their trailer to look outside. [T152] However, Richard Anderson testified that as soon as he heard the sounds outside his trailer, he looked out to see what was happening. [T64,88]

Prior to the time the door was opened, Richard Anderson heard an unidentifiable voice say, "leave this camp before we kill you". [T82] Eric Tilley and Richard Anderson then followed Sherman Gallardo and looked out the door after Sherman Gallardo, who said something to the people outside. Eric Tilley testified that Sherman Gallardo said, "cool it, Don", and immediately someone turned and responded with a threat that, "if you don't want some of this, stay inside". [T152] Richard Anderson testified that when the door was first opened, Don Brown swung a crescent wrench at Richard Anderson and asked him if he wanted some of this. [T67] But Appellant in contradiction testified that he was the only person who held the crescent wrench that night. [T655] Richard Anderson testified that the door remained opened throughout the fight; [T88] Eric Tilley, however, in a sharp contradiction to Richard Anderson's testimony testified that the door was closed

after Sherman Gallardo was threatened, and was reopened by Richard Anderson only after a period of five to ten minutes, and was generally shut. [T154]

When Richard Anderson first looked out the door, he allegedly saw Don Brown, William Cummins, Billy Cayer and the Appellant kicking and beating Mike Ramirez. [T66] However, Eric Tilley, who was standing in front of Richard Anderson, testified that he saw only three people standing around one person lying on the ground and that those three people were Appellant, Billy Cayer, and either Don Brown or William Cummins, [T153] who look alike, since they possess the same build and color of hair.

Richard Anderson, in contradiction to Eric Tilley's testimony stated that he was able to see the persons and events by virtue of light emanating from the open doors of trailers #1. [T75-76, 108] Eric Tilley testified that only one dim stove light was on in trailer #1. [T172]

Richard Anderson testified that he did not see all of the rest of the fight because Sherman Gallardo and he took turns looking out the door. [T81, 104] Richard Anderson also testified that William Cummins did most of the beating during the times he was watching. [T551] The fight gradually moved from the front of trailer #2 to behind the amphibian parked in front of trailer #1. [T101] Richard Anderson testified he saw William Cummins choking Mike Ramirez [T72] and saw him hitting him in the face behind the amphibian vehicle. He also saw Appellant hit Mike Ramirez several times with a wrench, [T73] prepare to stab Mike Ramirez with a knife, and then swung the knife at Sherman Gallardo when he said "you don't want to

do that, man". [T67-69]

Throughout the fight Richard Anderson testified that he considered Don Brown, William Cummins, Billy Cayer, and the Appellant, who were all pretty drunk, to be dangerous, because he didn't know just what they would do. [T175]

Although the fight lasted approximately 45 minutes, according to Anderson, all three of the occupants and witnesses of trailer #1 were military veterans armed with knives and a large two-by-four, yet paradoxically, and to their shame no one in trailer #1 assisted Mike Ramirez. [T115-117] Richard Anderson testified he thought that the end result of the fight would be a beating, namely, that Mike Ramirez would be able to take care of himself and there would be no problem. [T560]

The time discrepancy of the time the fight lasted forty-five minutes to an hour, with the testimony of Richard Anderson, [T85] was highlighted when Eric Tilley testified it lasted no more than 15-20 minutes, [T173] and Mike Ramirez then got up, went into his trailer and washed himself off. Later around midnight, Richard Anderson stated he saw Cummins sitting on the amphibian. [T175] Thereafter, at about twenty-minutes later, Don Brown came over to trailer #1 to ask the occupants if they had seen anything, and Richard Anderson said "no" [T74] in contradiction to his own testimony that he did not do anything to make the Defendants think that he was asleep. [T99]

Around 5:00 a.m., Richard Anderson heard a knock on the door of trailer #1. [T77] When Richard Anderson and Sherman Gallardo opened the door, Mike Rameriz was seen sitting on the pallet out-

side the door. He asked them to call 911; told them he couldn't breathe, and asked for a drink of water. After drinking some water, Mike Ramirez collapsed and died. [T77]

Appellant, who testified at trial, presented a wholly different version of what happened.

While Eddie Apodaca was in trailer #3, Eddie Apodaca started a fight and then left for his trailer. [T633] After Eddie Apodaca went back to trailer #2, Billy Cayer left trailer #3, followed by William Cummins and Don Brown. [T640] Shortly, thereafter, the Appellant went looking for the others and found them in trailer #2 along with Eddie Apodaca and Mike Ramirez. [T641] After the Appellant entered the open door of trailer #2, he testified that Mike Ramirez had pulled out a knife and had stabbed Billy Cayer. [T642] Appellant then tried to find some nunchukas [T643] in the closet but was hampered by the close quarters. Once Appellant got out the nunchukas, Billy grabbed the nunchukas from Appellant and threw them towards the trailer door. [T644] The Appellant then left the trailer by himself. [T644-645]

Appellant was looking back in the trailer, and suddenly Mike Rameriz came out the trailer door and started to attack the Appellant. [T646-647] Rameriz kicked the Appellant, and Appellant fell backwards into a barrel. Appellant grabbed a crescent wrench off the barrel, and told Rameriz "Don't". Rameriz swung twice at the Appellant, when Appellant kicked Ramirez. [T647-648] But Rameriz would not stop coming with the knife so Appellant hit Rameriz with the wrench. [T648] The two struggled, and Appellant could only stop Rameriz with the wrench. [T651] Eventually, some

other person pulled Appellant and Rameriz apart, [T652] but Appellant was still concerned about the knife. Appellant then kicked the knife out of Rameriz's hand, and Rameriz then said he had had enough. [T653]

Appellant then went back into trailer #3, [654-655] had another drink and thereafter either passed out or fell asleep, and did not come to until morning, after Rameriz had died. [T655-656]

SUMMARY OF THE ARGUMENT

The trial court violated Appellant's constitutional right to a fair trial and committed reversible error in effectively denying the indigent Appellant the right to prepare an adequate defense, namely by not timely appointing to the defendant the assistance of a private investigator and a court appointed psychiatrist. The need for psychiatric evaluation was crucial in light of the Appellant's severe intoxication, and particularly where the State of Utah placed Appellant's mental state at issue by charging him with second degree murder.

Appellant's trial counsel made a timely objection to the trial date set by the District Court Judge; gave necessary notice for a Motion For Continuance, and made a reasonable effort to have the trial date rescheduled for good cause. The denial of Appellant's Motion For Continuance of the trial date severely impaired Appellant's defense counsel's ability to adequately prepare, especially for cross-examination of the State's eyewitnesses based upon their numerous prior and contemporary conflicting statements.

Consequently, the trial court violated Appellant's United States Sixth Amendment constitution right to effective assistance of counsel and abused its discretion in denying a trial continuance to allow counsel adequate time to prepare.

ARGUMENT

POINT I

THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL,
A FAIR TRIAL, DUE PROCESS OF LAW AND EQUAL PROTECTION BY
VARIOUS REVERSIBLE ERRORS COMMITTED BY THE TRIAL COURT
INCLUDING THE DENIAL OF A MOTION TO CONTINUE

Appellant asserts that the facts of this case affirmatively demonstrate that the Appellant did not receive effective assistance of counsel, a fair trial, due process of law, or equal protection under the law in violation of his United States Constitutional guarantees of the Sixth and Fourteenth Amendment and State of Utah constitutional right as guaranteed by Article I Section 12 by the arbitrary denials of various motions made by the Defendant, especially including motions for continuance.

Appellant places this claim squarely on the fact that throughout the trial, denials of motions for continuance placed the Defendant in the position that even on the eve of trial, Defendant and his counsel told the Court that they were unprepared to proceed through the trial. [Transcript of Hearing held January 18, 1990, pages 100-106] The Defendant had waived his right to a Speedy Trial [Jan. 18, T27] so as to allow other evidence to be gathered in support of his defense (inter alia, find the third eye-witness;

get expert testimony on the sound of the generator; further psychological examination and testimony for the mental state of the Defendant) [Jan. 18, T100-106] as well as to allow Counsel to prepare for trial, which was a concern expressed to the Court prior to trial. [Jan. 18, T27]

However, the Trial Court chose to ignore Defendant's requests, thereby hampering Defendant's ability to obtain the necessary evidence to fairly present his case to the Court, or to properly prepare for a trial of this magnitude.

Further, Appellant cites as grounds for reversal other denials of motions by the Court that denied the Appellant his right to a fair trial.

A. Belated Appointment of a Private Investigator To Assist the Appellant

The Trial Court after being requested, initially refused to appoint, and then reluctantly and belatedly appointed a private investigator to assist Appellant's trial counsel in pretrial investigation and preparation, thus prejudicing Appellant's right to a fair trial and requiring reversal of his conviction. Factually, the prejudice occurred as follows: On October 31, 1989, Appellant's appointed trial counsel made an oral motion for the appointment of a private investigator to assist him in pretrial investigation and preparation. The circuit court denied the motion on November 3, 1990. (R12-13, 28). The Appellant filed with the court a written Motion for Appointment of Private Investigator for Discovery and preparation of Defendant's cases pursuant to U.C.A.

77-32-1(3) (Minimum standards provided by County for defense of indigent defendants.) The District Court trial judge did not enter an Order appointing a private investigator for Appellant until January 17, 1990, more than two months after the initial request for a private investigator and less than six (6) days before the trial date of February 5, 1990. [R. 207-208] (Emphasis Added).

U.C.A. 77-32-1(3) statutorily requires each county to provide indigent persons with the investigatory and other facilities necessary to prepare a due process of law defense. Moreover, an indigent defendant has a right, cognizable by the Federal Constitution, to the Appointment of an investigator or expert at State expense to assist in the preparation and presentation of his defense. Wharton's Criminal Procedure (12th E.) Sec. 414. The State of Utah's duty to provide an indigent with the means for an appropriate defense stems from a just interplay of the constitutional right to counsel, to a fair trial, and due process of law. State v. Rush, 217 A.2d 441 (N.J. 1966). See also, Ake v Oklahoma, 470 U.S. 68, 76-87, 105 S. Ct. 1087, 1092-98. In the Ake case the governmental interest in denying the assistance requested to save some money was not considered substantial in light of the compelling interest of both the state and the individual in a fair trial. Obviously, the use of a private investigator to perform certain duties that the attorney would otherwise have to perform usually is cost effective for the State of Utah, in that valuable and costly attorney billable time is not wasted on work that otherwise a competent investigator would normally do.

Like the Ake case, U.C.A. 77-32-1(3) manifests the value and

importance attributed to providing indigent defendants with the assistance requested, namely private investigatory assistance, at least in the State of Utah. The facts of this case clearly demonstrate that a grave risk of a denial of due process of law existed if such private investigatory assistance was not rendered, especially where, as here, the criminal charges made were extremely grave and involved many conflicting versions made by eyewitnesses, and a factual issue was raised in regard to the lighting at the scene of the crime which affected the eyewitnesses ability to perceive who inflicted the beating, and at what times, and who was ultimately involved in the fatal outcome. For example, the State of Utah notified Appellant's trial counsel that there would be twenty or more witnesses involved. The various written and recorded statements of Don Brown, the State's three key witnesses, Richard Anderson, Eric Tilley, and Eddie Apodaca, as well as another eyewitness, Sherman Gallardo, who disappeared prior to the preliminary hearing, contained numerous conflicting and different statements of fact. Because of the number of witness statements taken; the conflicting factual versions contained therein; the discrepancies between the witnesses' stories and Appellant's recollection of the events, it was necessary to the preparation of an adequate defense that a private investigator be appointed to assist in interviewing the witnesses; to point out inconsistencies to the witnesses, and attempt to decipher the truth prior to the preliminary hearing held on December 19th, 20th, 21st, and 22nd of 1989. Equally important was the need to investigate facts of Defendant's self-defense claims.

The Utah Supreme Court has rightfully recognized that "the preliminary hearing is an important step in the criminal process in that it serves as both a discovery device and a means to preserve evidence for trial." State vs. Neeley, 748 P.2d 1091, 1095 (Utah 1988). Once a witness testifies under oath at a preliminary hearing they are less likely to change their stories if presented with inconsistencies in their statements, or discrepancies between their testimony and that of others. If a preliminary hearing is to fully and effectively serve its purposes, the Appellant must have the opportunity to interview witnesses prior thereto, so that witnesses may take account of discrepancies and inconsistencies before their testimony is preserved, and as it were cast in stone.

If a private investigator had been appointed by the Circuit Court Judge and had been available to take pictures of the crime scene prior to the preliminary hearing, which contradicted the State's eyewitness, these pictures could have been shown to the witnesses to facilitate their recollection of exactly who and what they were able to see or not see from various vantage points. Most notable, Richard Anderson's testimony regarding the events occurring in front of either trailer is highly suspect, since arguably the door would have obstructed his view (whether open or shut). The Appellant's defense was also hampered by the lack of information regarding the background of Mike Ramirez and his character for violence and all of the key witnesses, all transients, that could have been investigated by a private investigator. Without such information, Appellant was severely restricted in challenging their credibility, or in showing that the

victim possessed a violent character in support of the Appellant's contention that he was acting in self-defense. The problem of the use and need for a private investigator was evident at the time of the preliminary hearing and became more acute as the matter neared the trial date. A timely motion was made for the appointment of a private investigator, but the belated appointment had a devastating effect on the ability of defense counsel to prepare, and to allow the defendant to prepare his self-defense argument. Add to that the denial of Defendant's motion to continue, and there is little doubt that the interests of justice were not served in this trial.

The foregoing leaves little doubt that both the Appellant's State and Federal due process of law constitutional right was violated, requiring this court to reverse his conviction by the belated appointment, by the Trial Court, of a private investigator to assist the Appellant in his preparation.

B. The Denial of a Continuance to Obtain and Denial of Appellant's Motion for Psychiatric Assistance Prevented Crucial Testimony of Defendant's Intent.

Appellant argues the First Judicial District Court further violated the Appellant's United States Sixth and Fourteenth Constitutional Amendment guaranteed rights and State of Utah constitutional rights under Article I Section 12 of the Utah Constitution by denying the Appellant's Motion to Continue so as to pursue psychological testing and mental evaluation. On January 16, 1990, thirteen days after the District Court Arraignment of the Appellant on January 3, 1990, Appellant filed with the Trial Court the motion along with a Notice of Intent to Call Psychiatric and

Other Expert Witnesses and a Notice of Intent to Claim Lack of Capacity to Form Intent made for the exclusive purpose of establishing, by expert psychiatric testimony, that the Appellant was unable to form the necessary intent to commit second degree murder because of Appellant's voluntary intoxication. [R.184g, 187-188, 189, 191-192].

The Trial Court allowed some of Appellant's multiple motions, but did not allow a continuance for Appellant's counsel to pursue such testing or evaluation. In so ruling, the Trial Court committed error since it was a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution for the State to deny an indigent defendant the needed assistance of a psychiatric expert, where as here, the defendant's mental state at the time of the offense was a substantial factor in his defense.

The United States Supreme Court's holding in Ake vs. Oklahoma strongly supports the conclusion that the Trial Court was the erring party in this trial. 470 U.S. 68, 76-87, 105 S Ct. 1087. 1092-98, 84 L Ed. 2d 53 (1985). In Ake the United States Supreme Court held that a state is required to provide an indigent defendant with the assistance of a psychiatrist to support his insanity defense based, in part, upon the following reasoning:

"The Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal, where, simply as a result of his poverty, a

defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake . . . To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal", and we have required that such tools be provided to those defendants who cannot afford to pay for them. . . Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling . . . At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right . . . We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the state and the individual in accurate dispositions".

470 U.S. at 76-79, 105 S. Ct. at 1092-94 (citations omitted; emphasis added).

The Court then cited to numerous state statutes, including Utah Code Anno. 77-32-1, and other court decisions which recognized an indigent defendants right to the assistance of a psychiatrist's expertise as reflecting:

"[the] reality...that when the State has made the defendant's mental condition relevant to this criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial of the defendants ability to marshal his defense".
470 U.S. at 80, 105 S. Ct. at 1095.

From these strong judicial pronouncements it is not difficult to conclude that the Trial Court here violated Appellants Federal and State constitutional rights to a fair trial, where as here, the Appellant's state of mind, especially in light of a self-defense

argument, compounded by excessive drinking, should have been properly evaluated by a psychiatrist. See Ake, 470 U.S. 68, 76-87, 105 S. Ct. 1087, 1092-98. C.f., State v Woods, 648 P.2d 71, 88 (Utah 1981) ("The refusal to grant an indigent defendant's timely motion for psychiatric assistance in a capital case is an abuse of discretion....It is also a denial of due process").

The following mens rea, mental state required by Utah Code Ann. Sec. 76-5-203(1) for a conviction of guilty of second degree murder are stated as:

- (1) intentionally or knowingly causing death of another;
- (2) intending to cause serious bodily injury to another;
- (3) commits an act clearly dangerous to human life that causes the death of another;
- (4) acting under circumstances evidencing a depraved indifference to human life engages in conduct which creates a grave risk of death to another and thereby causes the death of another.

See State v Standiford, 769 P.2d 254, 263-65 (Utah 1988). In this case, expert psychiatric testimony was crucial to the central issue of whether the Appellant, due to voluntary intoxication, was unable to form the requisite intent to commit homicide.

C.f., State v Miller, 677 P.2d 1129 (Utah 1984) (the exclusion of expert psychiatric testimony on the issue of intent was found to be reversible error); State v Sessions, 645 P.2d 643,645 (Utah 1982) ("basic rules of evidence pertaining to materiality and relevance require that a defendant have the right to adduce evidence which would tend to disprove the existence of specific intent"). The

facts in this case do not demonstrate that the Appellant knowingly and voluntarily waived his due process right to the assistance of a psychiatric expert.

C. The Denial of Appellant's Motion for the Jury to View the Scene.

Discharge of the jury's duty to judge the evidence fairly and render a considered verdict depended upon the jury's view of the crime scene. The request for a jury view, which the trial judge refused to allow, further constituted an abuse of the court's discretion to see that a fair trial had occurred. The evidence adduced at trial did not adequately portray the lines of sight and dim light by which the eyewitnesses were, or were not able to see the events. In that setting, without question, sound judicial discretion should have granted to the jury the right to view the scene of the homicide for the purpose of assessing the weight to be given, in particular, to Richard Anderson's eyewitness testimony in light of the weighty, conflicting evidence.

The crime took place near midnight in late October in a rural area. The only lighting was from dim trailer house lights. Only one witness, Richard Anderson, stated Appellant was involved in the major part of the fight that occurred outside the trailer house. Richard Anderson's testimony is inconsistent in numerous aspects with his prior statements, and preliminary hearing testimony and with the statements and testimony of other witnesses. His line of sight in all probability was also obstructed by door frames and vehicles. All this was either pointed out or alluded to when the oral motion was made [see 1/18 transcript, p. 11 - 13, 17]. With

the verdict hinging on such inconsistent eyewitness testimony, it cannot be said that a refusal to permit a jury view of the crime scene fell within the Trial Court's sound judicial discretion. Rather, such a crime scene view would have contributed substantially to the presentation of Appellant's defense based on inadequate eyewitnesses identification of the Appellant. An appropriate ruling by this Court would be to reverse Appellant's conviction on the grounds that the Trial Court abused its sound discretion by not permitting a jury view of the crime scene under Utah Rules of Criminal Procedure 17(i).

D. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO SIT ALL DAY IN THE JURY ROOM WHILE WAITING FOR THE JURY INSTRUCTIONS TO BE PREPARED.

Appellant contends that the Trial Court erred when the jury was allowed to sit in the jury room all day long while the Court, along with the attorneys prepared the jury instructions. Appellant contends that doing so was a denial of a right to a fair trial in that after four days of testimony, the jury took less than three hours to conclude it's verdict. It is Appellant's claim that the jury could not have reviewed the days of testimony, especially the conflicting testimony of the State's own witnesses, during such a short time frame.

There was testimony of Appellant's own self-defense as well as the testimony of all the other witnesses that needed to be reviewed. The only way, Appellant himself contends, for the jury to make up it's mind is that they impermissibly decided the case before the case along with the jury instructions were submitted to

them. [See R 354]

POINT II

THE PROSECUTING ATTORNEY'S MISCONDUCT, INCLUDING ALLOWING PERJURY, AS WELL AS CONTACT BETWEEN WITNESSES, CONSTITUTES REVERSIBLE ERROR

Defendant/Appellant requests that counsel submit to this Court for review four specific acts of the prosecuting attorney that Defendant/Appellant claims are actions that warrant reversible error in this matter:

- A. Allowing perjured testimony of Richard Anderson, an eye-witness, to be used at trial;
- B. By discounting Defendant's claim of self-defense, by remarking that it was made up and rehearsed;
- C. Failure to produce the so-called weapon (sharpening stone) used in the aggravated assault against Eddie Apodaca.
- D. Vouching for the credibility of a witness.

A. PERJURED TESTIMONY OF RICHARD ANDERSON

One of the eye-witnesses to the events, Richard Anderson, testified that he directly saw what happened on the evening of October 25, 1989. Yet, testimony of other eye witnesses sharply

contrasted with what Mr. Anderson stated. [See Statement of Relevant Facts of Issues Presented For Review].

Defendant claims the County Attorney impermissibly:

- (1) allowed Richard Anderson to testify falsely when it was known that Richard Anderson was not telling the truth because of the inconsistency of the stories as well as the fact that Richard Anderson could not have seen what he claimed he saw;
- (2) allowed Richard Anderson to change his testimony, when another eye-witness contradicted Mr. Anderson as to a key point in the testimony after Mr. Anderson was told outside the Courtroom that the other witness contradicted Anderson's story.

In support of his claim that perjured testimony was allowed, Defendant points out that neither Richard Anderson nor Eddie Apodaca could see what they claimed to have seen (inter alia, people from sixty feet away between two trailers; the happenings outside trailer #2 or #1 because the door was closed). As the Prosecuting Attorney knew or should have known that such testimony was incorrect, it should not have been used.

The United States Supreme Court has consistently held that the use of false or perjured testimony by the State to obtain a conviction, when the State knows that such testimony is false is a violation of the Fourteenth Amendment of the Constitution. They have also held that it is of no consequence that the false

testimony concerned the witness' credibility.

The Supreme Court said in the case of Napue vs. Illinois, 360 U.S. 264, 31 ed 2d 1217, 79 S Ct. 1173 (1959) that,

First, it is established that a conviction obtained through use of false evidence, known to be such by representative of the State, must fall under the Fourteenth Amendment, Mooney vs. Holohan, 294 US 103, 70 L ed 791, 55 S CT 340, 98 ALR 406; Pyle v. Kansas, 317 US 213, 87 L ed 214, 63 S CT 177; Curran v. Delaware (DA3 Del) 259 F.2d 707. See New York ex rel. Whitman v. Wilson, 318 US 688, 87 L ed 1083, 63 S Ct 840, and White v. Ragan, 324 US 760 89 L ed 1348, 65 S Ct 978. Compare Jones v. Kentucky (CA 6 KY) 97 F2d 335, 338, with Re Sawyer's Petition (CA7 Wis) 229 F2d 805, 809, Df. Mesarosh v. United States, 352 US 1, 1 L ed 2d 1, 77 S Ct 1, 9. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 US 28, 2 L ed 2d 9, 78 S Ct 103; United States ex rel. Thompson v. Dye (AA3 Pa) 221 F2d 763; United States ex rel. Almeida v. Baldi (CA3 Pa) 195 F2d 815, 33 ALRwd 1407; United States ex rel. Montgomery v. Ragen (DC Ill) 86 F Supp 382. See generally annotation, 2 L ed 2d 1575.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 NY2d 554, 557, 154 NYS 2d 885, 887, 136 NE2d 853, 854, 855.

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is any way relevant to the case, the district attorney has the responsibility and duty to

correct what he knows to be false and elicit truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

The Fourth Circuit Court of Appeals specifically addressed the question of when the police knew of information that the prosecutor did not in the case of Barbee v. Warden, Maryland, Penitentiary, 331 F2d 842 (1964). The Court said,

"Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also a part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure."

The Court went on further to say,

"With respect to the necessity for a showing of prejudice, the cases sometimes draw a distinction between the knowing use of false testimony and the passive nondisclosure of exculpatory evidence. In the first type of case the sentence will be set aside without inquiring into whether the defendant has been prejudiced, while in the latter some consideration of the possible effect of the irregularity upon the fairness of the trial is necessary."

The issue was addressed by this Court in the case of Walker vs. State 624 P.2d 687 (Utah 1981) where the Court held that,

"It is an accepted premise in American Jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with rudimentary demands of justice! The proposition is firmly established that conviction obtained through the use of false evidence known to be such by representatives of the State, must

fall under the due process clause of the Fourteenth Amendment and Article I Section 7, of the Utah Constitution, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. This standard derives from both the prosecutorial misconduct and more importantly the fact that the use of false evidence involved a corruption of the truth seeking function in the trial process."

For his second point, Defendant points out, Eric Tilley testified that Richard Anderson left the trailer to search the only truck for keys. Richard Anderson had testified that he had not left the trailer.

Deputy Dale Ward (who had been identified as a witness) then contacted Richard Anderson to tell him of the contradiction of testimony. Such contact between witnesses was in violation of the Court's order of the exclusion of witnesses. In fact, Mr. Anderson was told not to discuss the case with other witnesses, [T147] which would include the Sheriff's Deputy that had sat at trial to assist the Prosecuting Attorney.

Thereafter, Richard Anderson was recalled to testify regarding his leaving the trailer to search the truck, and without explanation, he changed his story from not going outside his trailer [T90, 136] to one that he in fact did. [T147]

Defendant maintains that the Prosecuting Attorney erred by allowing Dale Ward to violate the exclusionary rule and using the testimony after Dale Ward spoke to Richard Anderson.

The leading Utah cases dealing with prosecutorial misconduct provide a two-step evaluation process; whether misconduct occurred and whether the jury is probably influenced by the actions. State

v. Troy, 688 P.2d 483 (UT 1984); State v. Valdez, 513 P.2d 422 (UT 1973).

Certainly step one is evident. To allow a prosecuting attorney to circumvent the exclusionary rule is an act that crosses the boundary wherein discretion is allowed. Bad faith need not be shown. See State v. Lafferty, 749 P.2d 1255 (UT 1988).

Regarding step two, clearly the Prosecuting Attorney was so concerned regarding the contradiction that he asked the the witness to quash that contradiction when the witness was recalled in Defendant's main case. The Defendant's attack on the credibility of Richard Anderson and the veracity of the story that Richard Anderson made up was a key point to the defense of Defendant. It was always Defendant's contention that Richard Anderson had wanted to somehow show that he was brave in light of the occurrences that night; as well as the fact that he molded his testimony to prove such a point. By allowing the testimony to come in the way it did (in violation of the exclusionary rule) it allowed the jury to not consider the claim of the Defendant that Richard Anderson had made up part of his story to protect himself from the shame of not rendering assistance in a situation where he thought help was needed.

Anderson claimed he was terrified of the happenings, yet it became known, through another witness, that he had indeed left the security of the trailer. Defendant claims that the Prosecuting Attorney should not have used the testimony of Richard Anderson after he had been caught in his lie. That was using perjured testimony and the Prosecuting Attorney should not have done so at

all.

B. ARGUMENTS REGARDING SELF-DEFENSE CLAIM

Defendant presented testimony that his actions in striking Rameriz were done in self-defense. The Prosecuting Attorney discounted that, and in closing arguments presented more than just theory, he presented evidence as to how the Prosecutor's theory of the fabrication of self-defense came about and that the story was not true or rehearsed. [T 740, 743, 745, 746, 750] Even that evidence was destroyed [T 732, 733] or placed.

The prosecutor repeatedly violated the prosecutorial and ethical duty to refrain from improper remarks made to the jury panel which were calculated to incite a conviction on references to the nature of the Defendant's position [a transient, T785] crime as well as the concocted nature of the Defendant's self-defense. The duty of a prosecuting attorney has been aptly described in Commonwealth v. Gilman, 368 A2d 253 (Pa. 1977) wherein the Pennsylvania high court stated:

"[T]he prosecutor is a quasi-judicial officer representing the Commonwealth. His duty is to seek justice, not just convictions . . ."

"Although the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."

During closing argument, the prosecution has an obligation to:

". . . present facts so that the jury can dispassionately and objectively evaluate the testimony in a sober and reflective frame of mind that will produce a judgment warranted by the evidence and not inspired by

emotion or passion.

The prosecutor's position as both an administrator of justice and an advocate "gives him a responsibility not to be vindictive or attempt in any manner to influence the jury by arousing their prejudices." In particular, the prosecutor must limit his argument to the facts in evidence and legitimate inferences therefrom." (at 257 citations omitted).

The Box Elder County Attorney's statements were brought to the attention of the trial judge by way of the Motion for New Trial. The error of which Appellant complained to the Trial Court was that the prosecutor repeatedly suggested to the jury that Appellant conspired to fabricate the story of self-defense. There was never any evidence adduced that a jury could reasonably infer Ray Cabututan conspired to commit perjury or the self-defense claim. The Appellant asserts that the Trial Courts denial of the motion for new trial constituted an abuse of discretion and the prosecutors remarks constituted plain error.

An abuse of discretion occurs when, taking into account any remedial measures ordered by the Trial Court, the prejudice to the defendant still satisfies the standard for reversible error set forth in Utah R. Crim. P. Rule 30. Errors and defects. The remedial measure of a new trial was requested, but refused.

C. FAILURE TO PRODUCE THE WEAPON FOR THE AGGRAVATED ASSAULT

Appellant claims that there should have been no conviction on the charge of aggravated assault because the sharpening stone was not produced so as to give the jury the opportunity to determine if the weapon was in fact a deadly weapon as stated in the information.

D. VOUCHING FOR THE CREDIBILITY OF A PROSECUTION WITNESS

Finally, the prosecution committed plain error in vouching for the credibility of Richard Anderson. [T 746] See United States v Ludwig, 508, F.2d 140, 143 (10th Cri. 1974), and otherwise interjecting his personal opinions on such matters regarding Richard Anderson having no reason to lie. [T 784, 787] It was prejudicial error for the Box Elder County Attorney to inject his personal opinion regarding Richard Anderson's credibility, thereby clearly and improperly intruding upon the jury's exclusive function of evaluating the credibility of witnesses. In such a case, without the Court immediately intervening and taking curative action in regard to the Box Elder County Attorney vouching for the credibility of a witness, a jury has no choice but to give such statements full credibility, since they came by and through the power and prestige of the office of the Box Elder County Attorney. See Gilman, 368 A.2d at 258-59. As previously noted, it has been firmly established by case law that a prosecutor may not express his personal opinion regarding a defendant's guilt, credibility or trial strategy. *Id.* at 258.

However, it was done so in this matter and was an error that the Court allowed to the detriment of the Defendant inasmuch as the conflicting nature of the State's witnesses (Tilley and Anderson on the ability to see and the open door). Such a departure from the standards mandates that the decision of the Trial Court be reversed.

POINT III

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR
CONTINUANCE CONSTITUTED A CLEAR ABUSE OF DISCRETION
AND A VIOLATION OF DEFENDANT'S CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The First Judicial District Court committed reversible error by denying the Appellant's Motion for continuance of the trial date set (p. 150). While the granting of a continuance is within the sound discretion of the trial judge, whose decision will not be reversed absent a clear abuse of discretion, an abuse may be found where a party has made timely objections, given necessary notice and made a reasonable effort to have the trial date reset for good cause, as occurred in this criminal case. State v Creviston, 646 P.2d 750, 752 (Utah 1982). The denial of a motion for continuance may also constitute reversible error on the grounds that the denial effectively obviated Defendant's United States Constitutional guarantee to effective assistance of counsel whereby counsel lacks sufficient time to prepare his defense. See Hintz v Beto, 379 F.2d 937, 942 (5th Cir. 1967) Among other things, the lawyer was denied the opportunity to review and analyze the self-defense argument; review the claim of capacity; analyze the separate nature of the trials and its affect on Defendant's claim of self-defense.

On January 3, 1990, the Trial Court scheduled the trial for January 22, 1990, through January 26, 1990, over the strong oral objections of Appellant's counsel. In denying the Motion For

Continuance for Trial Date, the Trial Court failed to inquire as to the amount of time that Appellant's counsel deemed necessary to prepare for trial, or to schedule a pretrial conference, as provided for by Rule 13 of the Utah Rules of Criminal Procedure to address preparation and other relevant trial issues. The Court also failed to schedule a pretrial conference as required by the Court's own rules. (See Appendix, attached to this brief.) Shortly thereafter, on January 10, 1990, Appellant filed with the Trial Court a written Motion for Continuance of the Trial Date. [R. 142]. Among the numerous grounds stated for a continuance of the trial date cited in Appellant's Motion, was the pertinent fact that Appellant's counsel had not yet received a copy of the 949 pages of transcript of the Preliminary Hearing for counsel examination. In addition to the necessity of reviewing the voluminous Preliminary Hearing transcript, Appellant's counsel, during the short time remaining prior to trial, was faced with the following preparatory trial responsibilities that required sufficient attorney time for:

(1) the need to review and carefully analyze the extraordinary amounts of physical, documentary, and expert evidence, including the statements of various witnesses;

(2) the need to review and analyze, not only by counsel, but also by experts assisting counsel, documentary evidence generated by the State's medical examiner and forensic blood expert, which the prosecution had agreed to provide to Appellant's counsel at the Preliminary Hearing, but which Appellant's counsel had not received as of the date of the Motion for Continuance on January 10, 1990;

(3) interview potential witnesses, including Pat Bentzley and Darrell Green, the Appellant's boss and a supervisor at Western Brine Shrimp Company, who each, according to the Appellant, at least would have testified that Appellant was a good worker and would otherwise provide good character testimony;

(4) the need to consult with and prepare the trial testimony Dr. Finkle, the Court appointed toxicologist expert, on the effects of alcohol on an individual who had consumed as much alcohol as the Appellant had on the night of October 25, 1989;

(5) the need to obtain accurate photographic evidence of the crime scene that would depict the lines of sight of the various State witnesses, and the dimness of the lighting from the trailer houses at night; and

(6) additionally, the need to consult with a psychiatric expert on the Appellant's ability to form the requisite intent for the charged crime of Second Degree Murder. The time constraints imposed by the Trial Court in denying Appellant's Motion For a Continuance of Trial Date adversely impaired the Appellant's United States Constitutional and Constitution of Utah guarantee to effective assistance of counsel and to a fair trial, at least in the following:

Appellant's counsel did not have sufficient time to review, in any depth, the Preliminary Hearing transcripts or the written statements and transcribed interviews of various key witnesses. Clearly, reversible error was committed as a result of the Court in denying Appellant's Motion to Continue the trial date to allow defense counsel to adequately prepare for trial,

especially where the charges made were so grave.

The Sixth Amendment to the Constitution of the United States states in part:

"In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor and to have the Assistance of counsel for his defense."

The standard of review applied to cases where the assistance of counsel is challenged has been established by the United States Supreme Court. The Court has stated,

"To succeed on a claims of ineffective assistance of counsel requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment and that the deficient performance prejudiced the defense."

Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), 80 L.Ed.2d 674; see also State v. Morehouse, 748 P.2d 219 (Utah Ct. App. 1988); State v. Frame, 723 P.2d 401 (Utah, 1986). And further, in order to show prejudice to his case, Defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence of the outcome. Strickland, 466 U.S. at 649, see also Morehouse, 748 P.2d at 219; State v. Archuleta, 747 P.2d 1019, 1023 (Utah, 1987); State v. Wynia, 82 Utah Adv. Rep. 16.

Defendant claims that errors were committed at trial due to the Court's failure to allow adequate time to prepare for trial [R. 352-356]. Those errors were as follows:

Failure to:

- (1) adequately cross-examine witnesses;
- (2) object to Jury panel or insure that minorities were on panel;
- (3) determine whether to separate or join trials with Co-Defendants [Jan. 18 T 80 - 81];
- (4) investigate alcohol/intent claims by a psychiatrist;
- (5) adequately prepare the self-defense argument.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL

On March 2, 1990, Appellant filed a Motion For A New Trial based upon 14 separate arguments of misconduct, abuse of discretion, and new testimony that was formally unavailable to the Defendant [R. 348-351]. In support of the Motion, the Defendant, himself, filed an Affidavit [R. 352-356].

After consideration of the oral arguments, the Trial Court denied the Motion For A New Trial [R. 368]. Appellant claims that new evidence, formally unavailable to be presented, now existed which would exculpate the Defendant.

It is a rule that newly discovered evidence which merely seeks to impeach prosecution witnesses does not ordinarily warrant a new trial. But, the District Court held in U.S. v. Atkinson (D.C. N.Y. 1977) 492 F Sup. 880, that in some circumstances it is sufficiently

important so that a new trial should be ordered.

On a Motion For A New Trial, the Court must review the challenged trial proceedings to ensure that the dictates of due process have been met. It is the obligation of the Court to ensure that fundamental fairness has been provided. U.S. v. Narciso (D.C. Mich. 1977) 446 F Sup 252.

The issue is the integrity of the judicial process. The Court could not have made a full determination of findings without having heard the evidence. It refused to hear the evidence. This was a mistake, and in and of itself constituted an abuse of discretion.

As the Utah Supreme Court stated in State v. Harris (Utah 1973) 513 Pac. 2d 438, 439, 440:

"The denial of (a Motion For A New Trial on the Ground of Newly Discovered Evidence) will be deemed an abuse of discretion...where there is a grave suspicion that justice may have been miscarried because of the lack of enlightenment on a vital point, which new evidence will supply..."

The Jury never heard the evidence sought to be presented by the defense on the Motion For A New Trial. The Judge never heard the evidence. Neither the Judge nor the Jury, therefore, was able to be enlightened on a vital point.

Appellant claims that the trials of the other Defendants produced testimony that he, himself, had been the one:

- (1) to hit Rameriz;
- (2) was the only one outside when it happened, and
- (3) that he was not seen later.

At trial, Defendant sought to have the three (3) Co-Defendants

testify. However, each of them, facing their own trial, refused to testify by invoking their Fifth Amendment rights.

However, after trial, their testimony, which was not contradictory but exculpatory to the Appellant was available by way of transcript.

Defendant, having tried to present at trial this testimony, which only became available to him after the trial of the other three (3) Co-Defendants, should now be allowed to use the same.

It should be noted that each of the Co-Defendants had the opportunity to use Appellant's testimony (and at least 2 did so).

POINT V

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE
THE JURY, COURT AND CRIMINAL SYSTEM
WAS PREJUDICIAL TOWARDS HIM

Counsel submits the argument, pursuant to Defendant's wishes, and under the Rules pursuant to Anders v California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 443 (1967) that Defendant was denied a fair trial due to biased opinions against him based upon his race.

In support of this position, Defendant maintains that:

A. Defendant was not tried by a jury of his peers because there were no minorities on either the jury or jury panel.

B. The Court thought the Defendant was a Hispanic rather than American-Filipino [R 64].

C. Someone on the jury panel stated that the Defendant was Mexican, obviously calling to that person's attention and those seated near him that the Defendant was a minority. [Hearing on Motion for New Trial, March 23, T 10]

D. The conservative history of Box Elder County was such that no minority could receive a fair trial, as evidenced by the fact that after for days of testimony, the jury took less than two hours to decide 3 counts [March 23, T 10] and found the Defendant guilty on the charges.

E. The Court refused to allow the Defendant to call the three Co-Defendants, even though they may have only exercised their Fifth Amendment right to not provide self-incrimination. [Jan. 18, T 76 - 80]

POINT VI

THE NUMEROUS SUBSTANTIAL ERRORS COMMITTED AMOUNT TO CUMULATIVE ERROR

Even assuming that none of the foregoing substantial errors, in and of themselves constituted reversible error, the cumulative impact of each error prejudiced Appellant's right to a fair trial thus constituting reversible error. See State v. Rammel, 721 P.2d 498, 501-02 (Utah, 1986). Confidence in the verdict is undermined, at least to the extent that, in the absence of the cumulative errors, a reasonable probability exists that even if the jury disregarded the claim of self-defense, the Appellant would have been convicted of one of the lesser-included offenses of manslaughter or negligent homicide due to his voluntary intoxication and lack of formation of the requisite intent to commit Second Degree Murder. Under such circumstances, reversal is warranted.

See State v. Mitchell, 779 P.2d 1116 (Utah, 1989).

In Gooden v. State, 617 P.2d 248, 250 (Okla. Crim. App. 1980), the Court announced a similar test:

"[W]hen a review of the entire record reveals numerous irregularities that tend to prejudice the rights of a defendant and where an accumulation of errors denies a defendant a fair trial, the case will be reversed, even though one of the errors, standing alone, would not be ample to justify reversal."

Such is the case now before the Court. Throughout the entire process, the cumulative weight of the errors committed required a reversal and at the least a remand to the Trial Court for a new trial.

CONCLUSION

Appellant submits that the appropriate remedy is for this Court to reverse his conviction and grant Appellant a new trial because of the numerous substantial and prejudicial errors which are apparent on the face of the record which undermine confidence in the verdict.

Respectfully submitted this 12 day of February, 1991.

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Quinn D. Hunsaker
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four true and correct copies of Appellant's Brief on Appeal to: R. Paul Van Dam, Attorney General, 236 State Capital Building, Salt Lake City, UT 84114.

DATED this 12 day of Feb, 1991.

/s/

Attorney

Appendix

Local Rules of the First Judicial District Court

b. Continuances will be recorded in the file to give the court information on continuances. Who requested, reason, etc.

CRIMINAL CASE MANAGEMENT:

1. FILING OF CRIMINAL CHARGE

a. When an appeal or a case is bound over from the Circuit Court the matter will be placed on the next Law and Motion calendar for arraignment.

b. At the time of arraignment and if the Defendant wants to enter a "NOT GUILTY" plea, the court will then give the Defendant's Counsel and the County Attorney's office two weeks to see if a negotiation is possible. (Negotiation time will depend on type of case and discovery time) After the time allowed for negotiations the defendant and his/her counsel must appear before the court either to change the plea, dismiss the case or to set a trial date. At that time a trial setting will be given in court to the defendant and counsel.

c. If a settlement cannot be reached through the plea negotiations and a trial date is set by the court, it will:

1. Go to trial on the original charge.
2. No plea negotiations will be accepted by the court.
3. The defendant can enter a plea of guilty to the original charge.